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In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1883

WESTINGHOUSE ELECTRIC CORPORATION,
PETITIONER, et al.

vs.

JUDITH HUNTER, et al.,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF FACTS

1. More than 200 of the approximately 220 persons employed by defendant Westinghouse at its Byesville, Ohio plant, including the plaintiffs, participated in a work stoppage on September 10, 1969.

2. Although one-half of the employees who participated in the work stoppage were males, only five females were fired. Among those fired were the plaintiffs. The plaintiffs were not instigators of the strike nor did they participate to any greater extent than any other employee.

3. Plaintiffs Hunter and Vance filed charges with the Equal Employment Opportunity Commission (hereinafter EEOC) immediately following the

termination of their grievance procedure. The filing was 154 days from the date of discharge.

4. At the time of filing of the charges, EEOC policy was to accept as timely any charge filed with 90 days of the termination of the grievance procedures. The EEOC considered plaintiffs' charges timely filed and investigated the charges, issued probable cause determinations and attempted conciliation.

5. The charges were open and were being processed by the EEOC on March 24, 1972, the effective date of the 1972 Amendments to 42 U.S.C. 2000 e-5 which included extension of the filing period from 90 days to 180 days.

6. Contrary to the statement of Petitioner Westinghouse in its Statement of Facts, there is nothing in the record to support its claim that it was not notified of the charges until August 8, 1974. Nor was this claim ever made to the trial court by any of the defendants. Defendant Westinghouse's successor in interest at the Byesville plant, co-defendant Scoville Manufacturing Company submitted for the first time at the appellate level two letters from the EEOC addressed to Scoville dated August 8, 1974 serving notice of the charges on defendant Scoville. The charges were initially filed against defendant Westinghouse and since defendant Scoville had no interest in the plant at that time

and for years thereafter, it is not surprising that Scoville was sent notification from the EEOC at a later date.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED

None of the conditions stated in Rule 17 of this court's rules are present in this case. There is no conflict whatsoever among the federal court of appeals which have considered the issue presented by this case.

The Ninth, Eighth, and Sixth Circuit Courts of Appeals all have ruled that: the amendment extending the period for the filing of charges with the EEOC from 90 days to 180 days applies to charges still pending

before the EEOC but filed more than 180 days prior to the effective date of the amendment. Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), cert. denied, 435 U.S. 1007 (1978); Wood v. Southwestern Bell Telephone Co., 580 F.2d 339 (8th Cir. 1978); Hunter v. Westinghouse Electric Corp., 616 F.2d 267 (6th Cir. 1980). In addition, the Seventh Circuit Court of Appeals, while not required to reach this specific issue in its decision, cited the reasoning of the Ninth Circuit in Inda with approval. McDonald v. United Air Lines, Inc., 587 F.2d 357, 361 n.10 (7th Cir. 1978), reh. denied, cert. denied, 99 S.Ct. 2869 (1979).

1. THE NINTH, EIGHTH, SEVENTH AND SIXTH CIRCUIT COURTS OF APPEALS HAVE

CORRECTLY INTERPRETED THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964.

The 1972 Amendments to 42 U.S.C. 2000 e-5 included the extension of the period for filing charges with the EEOC from 90 days to 180 days. The amendments also provided that the amendments "shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." Equal Employment Opportunity Act of 1972 Pub. L. No. 92-261 14, 86 Stat. 103.

This court discussed the meaning of pending as it appears in the above cited Section 14 in the case of International Union of Electrical Workers, Local 790 v. Robbins &

Meyers, Inc., 429 U.S. 229 (1976) (hereinafter cited as Electrical Workers). That case involved a charge filed more than 90 days after the alleged discriminatory act but within 180 days of the enactment of the amendments. This Court stated:

> This reading of "pending" - confining to charges still before the Commission and timely when filed - is not the only possible meaning of the word, is largely rebutted by the legislative history,16 and renders the language of §14 virtually meaningless insofar as the enlarged limitations period is concerned.
>
> * * *
>
> "Pending" is simply not a term of art that unambiguously carries with it a meaning precisely suited for this situation; equally logical, for example would be an interpretation that read "pending" to mean "filed and not yet rejected."
>
> 16/ Section 14 was stated to be designed to cover "charges filed with the Commission prior to the effective date of the Act. Com-

mittee Legis. Hist., at 1851.
429 U.S., at 242 (emphasis added)

In a footnote to the decision, this Court expressly declined to rule whether the amendments apply to charges filed "more than 90, but less than 180, days from the date of the alleged 'occurrence', where the 180 days had run prior to March 24, 1972." It is not surprising that this Court would not reach this issue since those facts were not before the Court. However, the legislative history and the reasoning of this Court in Electrical Workers compel the conclusion that all charges which the EEOC had not finished processing as of March 24, 1972 benefited from the enlarged filing period.

Congress specifically intended the amendments to apply to charges filed with the Commission prior to the effective date of the amendments, which charges were still pending with the EEOC. There simply is no way to define the word pending that would be consistent with this Court's ruling in Electrical Workers and yet exclude the claims of these plaintiffs. As the Ninth Circuit Court of Appeals stated in Inda, 565 F.2d 554, 561, supra:

> If the charge was, on the date of enactment, on file with the Commission, and if final action had not yet been taken by the Commission with respect to the charge, the charge was pending in the sense in which that term is commonly used. It is that sense that we have attributed to Congress.

The Ninth Circuit Court of Appeals, as well as the Eighth, Seventh and

Sixth Circuits, have correctly interpreted the application of the 1972 Amendments to charges pending with the EEOC that were filed more than 90, but less than 180, days after the alleged discriminatory occurrence, where the 180 days had run prior to enactment of the amendments.

2. THE RETROACTIVE APPLICATION OF THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964 IS CONSTITUTIONAL AND DOES NOT OPERATE IN AN UNEQUAL OR ARBITRARY MANNER.

Petitioner is advancing the same argument that the retroactive application of the extended filing period is unconstitutional as was advanced by the employer in Electrical Workers and rejected by this Court. As stated in the Opinion:

> Robbins & Myers contends, finally, that Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period. This contention rests on an unwarrantedly broad reading of our opinion in William Danzer Co. v. Gulf & Ship Island R. Co., 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126 (1925). Danzer was given a narrow reading in the later case of Chase Securities Corp. v. Donaldson, 325 U.S. 804, 311-312, 65 S.Ct. 1137, 1141, 89 L.Ed. 1628 (1945). Electrical Workers, supra at 450.

This Court concluded that the retroactive application of the extended limitations period is constitutional.

There is no logical reason to distinguish this case from Electrical Workers as to the question of the constitutionality of the retroactive application of the extended filing periods. The discrimination charge filed in Electrical Workers was not

timely when filed and was constitutionally revived by the amendments.

Petitioner also claims that the application of the amendments retroactively affects the substantive rights not just the remedy. However, numerous courts have held that the 1972 Title VII Amendments did not create new substantive rights, but simply created new procedures and remedies for the vindication of these pre-existing rights. Brown v. General Services Administration, 507 F.2d 1300 (2d Cir. 1974); Adams v. Brinegar, 521 F.2d 129 (7th Cir. 1975).

The right to be free of discrimination in employment on account of sex was a substantive right of the plaintiffs prior to the 1972 amendments.

The amendments expanded the remedy available but did not create any new rights. In expanding the filing period, Congress realized that the prior 90 day period had caused inadvertent forfeiture of rights of untrained lay people who were unaware of their rights and remedies. The purpose of the expansion was to minimize this inadvertent loss of rights and remedies. See "Section-by-Section Analysis", 118 Cong. Rec. 7161, 7167 (1972). It is consistent with this remedial purpose to interpret Section 14 to validate arguably untimely charges which the Commission had accepted as timely and which it was processing as of March 24, 1972.

Petitioner argues that retroactively

applying the 1972 amendments to untimely charges arising from alleged discriminatory acts taking place more than 180 days prior to March 24, 1972 results in disparate treatment of similarly situated persons. Petitioner attempts to distinguish the situation in Electrical Workers by claiming that persons who filed charges based upon alleged discriminatory acts occurring within 180 days of March 24, 1972 were all treated the same. There is no difference between the classifications. Just as the charges of the plaintiffs were arguably untimely when filed, so was the charge in Electrical Workers. Just as the EEOC might have dismissed plaintiffs' charges as being untimely filed, so might the EEOC have dismissed

the charge in Electrical Workers. Just as there may be persons who filed charges under similar situations as the plaintiffs and the charges were dismissed, so may there have been persons similarly situated to the employee in Electrical Workers, whose charges were dismissed.

In addition, the claim that class of employees who will benefit from the retroactive application in a classification based upon the fortuity of administrative incompetence is not accurate. There was a "reasonable basis" for the fact that the EEOC considered the plaintiffs' and other similarly situated employees' charges as timely filed. That basis was that the EEOC considered the filing period

to be tolled during the pendency of grievance or arbitration procedures. As indicated in the record before the trial court, that was the reason that the EEOC considered the plaintiffs' charges to be timely filed. It was not until this Court's decision in Electrical Workers that the policy of the EEOC to accept such charges was invalidated.

The petitioner will not be deprived of due process of law if the 1972 amendments are applied to this case. Defendant Westinghouse was put on notice by the filing of the charge and has been given the opportunity to gather and preserve evidence in anticipation of administrative and court action. Occidental Life Ins. Co. v.

EEOC, 432 U.S. 355 (1977). As long as the charges were pending with the EEOC, Westinghouse could anticipate a Title VII suit and should therefore have maintained relevant records.

The fact that plaintiffs' charges were pending would not in any way affect Westinghouse's decision to sell the Byersville plant to Scoville. Nor would it affect Westinghouse's decision where to place the plant management personnel from the Byersville plant. All of these decisions were made by Westinghouse in its own estimation of its economic interests. Whatever effect these factors may have in a trial on the merits of this case are in no way attributable to plaintiffs but to Westinghouse's business

decisions. All parties, including plaintiffs, suffer the same difficulty locating witnesses and records when litigation is exended over several years.

Based on this Court's ruling in Electrical Workers and the fact that Westinghouse will not be deprived of property without due process, the retroactive application of the 1972 Amendments to this case is constitutional.

CONCLUSION

There is no conflict among the Circuit Courts of Appeals which have decided the issue presented by this case. Those decisions by the Courts of Appeals are consistent extensions of the logic and reasoning of this Court's decision in Electrical Workers. This Court has already ruled that the

retroactive application of the 1972 amendments is constitutional. This case does not involve an important question of federal law which affects many individuals. For all of the above reasons, Petitioner Westinghouse's Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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